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No. 09-1274

IN THE

Supreme Court of the United States

REGINALD CLEMONS, ET AL.,
Petitioners,

v.

LARRY CRAWFORD, ET AL.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 2

I. Contrary To The DOC's Assertions, The Decision Below Conflicts With This Court's Rule 8 And Method-Of-Execution Jurisprudence 2

II. Contrary To The DOC's Assertions, A Substantial Split Of Authority Exists Regarding The Type Of Allegations That State A Claim Under *Baze* 8

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Ashcroft v. Iqbal, 129 S. Ct. 1937 (2009) 1, 5

Baze v. Rees, 553 U.S. 35 (2008) 2, 4

Cooey v. Strickland, 589 F.3d 210 (6th Cir. 2009) 4

Emmett v. Johnson, 532 F.3d 291 (4th Cir. 2008) 4

Jackson v. Danberg, 594 F.3d 210 (3d Cir. 2010) 3, 4

Reynolds v. Strickland, 583 F.3d 956 (6th Cir. 2009) 8

Schwab v. State, 995 So. 2d 922 (Fla. 2008) 4

Taylor v. Crawford, 487 F.3d 1072 (8th Cir. 2007) 9

INTRODUCTION

The question presented by this petition is straightforward: whether detailed allegations of incompetence by Respondent ("DOC") officials state a claim that Petitioners face a substantial risk that they will suffer serious harm in the course of their executions. The DOC argues that the allegations are insufficient because "past performance does not guarantee future results." Br. in Opp. at 9. But the test at the pleadings stage is not whether Petitioners are "guaranteed" to face a substantial risk; it is whether such a risk is plausibly inferred from the allegations. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

Missouri's immediate "past performance" with executions has been uniquely disturbing. Petitioners have alleged that incompetence of the grossest kind was tolerated and ignored by DOC officials, the very administrators who have chosen the DOC's current execution team. The DOC candidly states its belief that it does not matter whether its execution personnel "have been professionally disciplined before or whether they have a criminal history" so long as they hold professional licenses. Br. in Opp. at 10. It is that approach to execution personnel that allowed Doe I, a licensed surgeon, to commit malfeasance. And it is, at the very minimum, plausible to conclude in light of Petitioners' allegations that the DOC continues to employ incompetent and untrained personnel. Any other conclusion would amount to presuming that the DOC has changed course in the face of credible allegations

to the contrary. The DOC is entitled to no such presumption at the pleadings stage.

Because the lower courts' error of law is clear and discrete, this case is appropriate for summary reversal and remand for continuing proceedings. Alternatively, Petitioners ask that this Court set the case for plenary consideration on the merits so that the lower courts may have additional guidance about the type of allegations that state a claim under *Baze v. Rees*, 553 U.S. 35 (2008).

ARGUMENT

I. Contrary To The DOC's Assertions, The Decision Below Conflicts With This Court's Rule 8 And Method-Of-Execution Jurisprudence.

The DOC's contention that Petitioners have failed to make out plausible allegations is incorrect. As explained in our Petition, Petitioners have made detailed allegations of substantial and pervasive incompetence and malfeasance at the DOC in the immediate past. These allegations include the fact that the DOC's prior team leader dramatically reduced the amount of thiopental given to inmates; that the DOC employed this physician knowing that he had been barred from practicing at area hospitals; and that the DOC continued to tout his supposed competence even after his malfeasance was publicly revealed. Petition at 18-21.

1. The DOC contends that this case "in large part reduces" to the question of whether the DOC's protocol is constitutional, but that is a red herring. Br. in Opp. at 6. Petitioners have not challenged the

constitutionality of the DOC's written protocol; instead they have alleged that the personnel charged with implementing the protocol are incompetent and are either incapable of or unwilling to carry out the protocol properly. The Eighth Circuit did not dispute that incompetent personnel would pose a constitutionally material risk of substantial harm. Pet. App. 14a-16a To the contrary, the Eighth Circuit emphasized that it was "imperative" the DOC employ competent personnel. Pet. App. 16a. Thus, when the DOC contends that "[a]ny factual challenge to the particular qualifications and training of execution personnel is not material," it is ignoring both law and logic. Br. in Opp. at 5. The DOC's protocol is only as good as the personnel who carry it out, and it is their competence that this case concerns.

2. The DOC has far less to say about the real issue in the case: whether Petitioners' detailed allegations of incompetence clear the plausibility threshold imposed by Fed. R. Civ. P. 8. The DOC does not and cannot dispute the malfeasance that took place in the immediate past. But it observes that other courts have refused to grant relief in method of execution challenges where the plaintiff had alleged past misconduct. Br. in Opp. at 11. Those cases, however, demonstrate the error of the decision below, because none of them was decided at the pleadings stage; instead all of them were decided at a later stage on the basis of record evidence. For example, the primary case that the DOC focuses on, *Jackson v. Danberg*, 594 F.3d 210, 224 (3d Cir. 2010), was reviewed after summary judgment. *Id.* at 223

("To survive summary judgment under *Baze*, the Plaintiffs must point to record evidence from which a reasonable fact finder could infer [a basis for a violation]."). The result in that case turned not on the insufficiency of the pleadings, but on plaintiffs' "evidentiary deficiency" in failing to prove that past inmates had suffered harm. *Id.* at 225 (holding that the importance of that "evidentiary deficiency" "cannot be understated").[1] Likewise, all the other cases that the DOC cites were not decided on the pleadings. *Emmett v. Johnson*, 532 F.3d 291, 297 (4th Cir. 2008) (summary judgment); *Cooey v. Strickland*, 589 F.3d 210, 218 (6th Cir. 2009) (stay); *Schwab v. State*, 995 So. 2d 922, 924-25 (Fla. 2008) (per curiam) (post-conviction review).

It is one thing to conclude after discovery that a plaintiff has failed to substantiate his allegations of incompetence. *Cf. Jackson*, 594 F.3d at 229 ("In sum, *on this record* we are compelled to conclude that the Plaintiffs have failed to show [an Eighth Amendment violation]") (emphasis added). It is another to presume, as the lower courts wrongly did here, that those allegations lack merit before a record is developed.

Likewise, this Court's decision in *Baze v. Rees*, 553 U.S. 35 (2008), does not justify the result below.

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[1] The *Jackson* Court used the word "understated," but from context it is clear it meant "overstated." The full sentence from the opinion is: "The importance of that evidentiary deficiency cannot be understated, since the constitutionality of Kentucky's protocol rested on the effective anesthetization of an inmate, as both the plurality and the dissent in *Baze* recognized." 594 F.3d at 225.

The DOC fails to address, let alone refute, Petitioners' argument that *Baze* was decided on a full trial record that revealed no shortcomings on the part of the Kentucky's execution team. Petition at 23-24. *Baze* presumably would not have come out the same way if that trial record had instead revealed, for example, that team members were drastically reducing the amount of thiopental they administered to inmates. To the contrary, the *Baze* plurality concluded that "failing a proper dose of sodium thiopental that would render the prisoner unconscious, there is a substantial, constitutionally unacceptable risk" of pain and suffering. 553 U.S. at 53. The *Baze* plaintiffs failed to prove such a risk existed after having the benefit of a fully-developed record. Their failure to develop such evidence necessarily does not make Petitioners' allegations insufficient as a matter of law.

3. The DOC also advances a cluster of arguments urging this Court to presume that because the DOC no longer employs Doe I, it has turned over a new leaf and no longer has a problem with incompetent personnel. Br. in Opp. 9-10. But that is the very question at issue in the complaint, and it cannot be presumed in the defendants' favor at the pleadings stage. Instead, Petitioners' allegations of incompetence must be credited so long they have "facial plausibility." *Iqbal*, 129 S. Ct. at 1949. Petitioners' complaint easily clears this standard, notwithstanding the DOC's arguments to the contrary.

The DOC attempts to recast Petitioners' allegations as going to Doe I's fitness, when in fact

Petitioners have alleged systemic problems with the DOC's recruitment and training of personnel For although Doe I no longer performs executions for the DOC, the same DOC personnel who recruited Doe I and defended his competence are the personnel who retained the DOC's current team. The DOC emphasizes that it now has a new Director, Br. in Opp. at 9-10, but it neglects to mention that the old Director was responsible for the retention of the current team. The same Director who found Doe I to be a "bright" "professional," and who retained him knowing that he had been barred from practicing at area hospitals, is the individual who selected the current team.[2] Nor does the record reveal any material changes post-complaint to execution team retention and training procedures.

Furthermore, post-Doe I, the DOC sought execution dates for Petitioners even before it had an execution team in place. Petition at 7-8. The Missouri Supreme Court declined to set execution dates at that time, but if it had, the execution date would traditionally have been within approximately 30 days, giving the DOC inadequate time to hire and train an execution team to carry out a new and untested protocol. Such actions are inconsistent with a commitment to providing competent personnel. Indeed, the DOC has freely conceded throughout this litigation that it considers licensed team members to

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[2] Respondent Crawford remained in his position as DOC Director until shortly before Missouri's current governor took office in January 2009. The current execution team members were chosen in the spring of 2008, more than a year earlier. Petition at 12.

be competent "regardless whether they have been professionally disciplined before or whether they have a criminal history." Br. in Opp. at 10. *See also Clemons v. Crawford*, No. 07-CV-4129, Motion for Judgment on the Pleadings at 12-13 (Dkt. 47) (W. D. Mo. Apr. 25, 2008). This view is emblematic of the DOC's continued and misguided approach to the evaluation of team member competency. Just as the DOC stood behind Doe I, a licensed surgeon, even in the face of incontrovertible evidence of his malfeasance, it continues, post-Doe, to persist in the dangerous view that past criminal conduct and professional discipline are irrelevant to a team member's suitability to perform executions.[3]

Ultimately, the question this case presents is whether it is implausible to infer, at the pleadings stage, that the DOC's well-documented problems with retaining competent personnel in the immediate past by the same officials have continued. If Petitioners' targeted and detailed allegations of systemic problems are insufficient then there truly is no set of allegations that would pass muster. The DOC contends that the ruling below does not foreclose all lethal injection claims, Br. in Opp. at 11, but it surely does because it holds that even when the DOC has had serious problems in the past, it can be presumed at the pleadings stage to have fixed

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[3] While it goes beyond the allegations of the complaint, it became apparent after the complaint was filed that the DOC is currently employing a team member, Doe II, who was convicted of aggravating stalking. Petition at 9, n.3. The DOC has never disputed that Doe II served on the execution team under Doe I and apparently failed to bring Doe I's malfeasance to the DOC's attention.

those problems as a matter of law. That presumption cannot be reconciled with this Court's basic teachings about the standards for a motion to dismiss, and it should be rejected.

II. Contrary To The DOC's Assertions, A Substantial Split Of Authority Exists Regarding The Type Of Allegations That State A Claim Under *Baze*.

The DOC is also incorrect to claim that the lower courts are in agreement about what is necessary to state a claim in a method-of-execution challenge post-*Baze*. The DOC asserts that the Sixth Circuit's decision in *Reynolds v. Strickland* is not at odds with the Eighth Circuit's decision here, but that is incorrect. The plaintiff in *Reynolds* obtained a stay of execution -- a standard that, unlike a motion on the pleadings, requires a showing of likelihood of success -- because of the "serious and troubling difficulties" Ohio had exhibited during three past executions. 583 F.3d 956, 956-57 (6th Cir. 2009). While the decision's reasoning was somewhat terse, it is plain that the court concluded that the plaintiff's challenge to, among other things, the "competency of execution team," had a sufficient likelihood of success in light of Ohio's past problems in carrying out executions. *Id.* at 957. That claim is analogous to the one here, and the case would have come out the other way in the Eighth Circuit.

The DOC also argues that Missouri, unlike Ohio, had not actually experienced material problems in its past executions. Ohio's primary problem was that its personnel had trouble placing an IV line in a

particular inmate. *See* Br. in Opp. at 13. That is a far more benign problem than the DOC's practice of arbitrarily and dramatically reducing the amount of thiopental it provided to inmates. And while the Eighth Circuit previously found that it could not affirmatively conclude that those inmates suffered pain, it also recognized that under the DOC's procedures, no signs of pain would be visible. "There is no dispute, however, that the [potassium chloride] *will* cause excruciating pain if the inmate is not adequately anesthesitized and that the use of the [pancuronium bromide] *will simultaneously mask any visible sign of that pain*." *Taylor v. Crawford*, 487 F.3d 1072, 1082 (8th Cir. 2007) (second emphasis added). At bottom, the *Clemons* and *Reynolds* Courts simply disagree about whether past misconduct can be a basis for alleging a substantial risk of future injury.[4]

The DOC is also unpersuasive in contending that the district court cases that have denied motions to dismiss on far less detailed allegations are immaterial. As Petitioners explained, these cases should be taken to evince an important split of authority because the denial of a motion to dismiss is generally not reviewable by a Court of Appeals. Thus, the DOC's stock admonition that the "resolution of that divergent authority is a matter

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[4] Respondents also fail to distinguish *Jones v. Bradshaw*, the other Sixth Circuit case cited by Petitioners. While it is true that Ohio did not oppose a remand for an evidentiary hearing, the Sixth Circuit would have had ample authority to have denied the COA or to have denied the petitioner's motion to remand. The fact that it did not is inconsistent with the result here.

best left for the courts of appeals," is misplaced. Br. in Opp. at 14. This Court should take the opportunity to resolve that "divergent authority."

CONCLUSION

The petition for a writ of certiorari should be granted.

June 7, 2010

Respectfully submitted,

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